Jones

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Toolmate Inc.--Request for Reconsideration

File: B-232158.2

Date: March 13, 1989

DIGEST

Request for reconsideration is denied where request only shows disagreement with the General Accounting Office's (GAO) decision not to disturb procurement which it found should have been conducted using competitive negotiation rather than sealed bidding. GAO did not disturb the procurement because the agency obtained full and open competition under the solicitation and the protester had not shown that it was prejudiced.

DECISION

Toolmate Inc. requests that we reconsider our decision, Milbar Corp., B-232158, Nov. 23, 1988, 88-2 CPD ¶ 509. In that decision, we denied Milbar's protest of the General Services Administration's (GSA) use of competitive negotiation rather than sealed bidding to procure retaining ring pliers under request for proposals (RFP) No. FCEN-FR-A8024-N-8-2-88. Toolmate was a participating interested party in the protest. Milbar has joined in Toolmate's reconsideration request.

We deny the request for reconsideration.

In the initial protest, Milbar argued that GSA was required by the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253 (Supp. IV 1986), to use sealed bidding procedures rather than competitive negotiation in conducting this procurement. GSA explained that it did not solicit sealed bids under this solicitation since it did not anticipate bids from at least two responsible bidders on a significant number of the 32 line items contained in the solicitation. Although we did not agree with the contracting officer's conclusion as to the availability of competition, we denied the protest because we thought that the agency had obtained full and open competition under its

solicitation and the protester had not shown that it was prejudiced by the agency's use of an RFP rather than an invitation for bids (IFB).

On reconsideration, both parties argue that the statutory standards for the use of sealed bids do not require a showing of prejudice. They also argue that sealed bid procurements are preferable to those conducted pursuant to competitive negotiations in that they are conducted in the open and do not lend themselves to abuses which are possible under negotiated procurements. Milbar argues, as it did in its initial protest, that there is prejudice to offerors in negotiated procurements when they are required to provide cost and pricing data and are required to submit a best and final offer.

It is well settled that a showing of prejudice is an essential element of any viable protest, whether or not it is based on an alleged statutory violation, and this Office will not disturb an on-going procurement where the deficiency does not unfairly deprive the protester of a contract award or affect the viability of the competition. See Carter Chevrolet Agency, Inc., B-229679, Feb. 3, 1988, 88-1 CPD ¶ 107; RG&B Contractors, Inc., B-225925.2, Mar. 10, 1987, 87-1 CPD ¶ 272. In this regard, as we stated in our initial decision, the record shows that there was no significant difference in the agency's issuance of the solicitation as an RFP rather than an IFB. The RFP provided that award would be based on price, there was no requirement for the submission of technical or cost proposals and the agency had not indicated that discussions would be requested. Furthermore, there was no indication that any firms expected to participate were inhibited by the use of negotiation procedures. In fact, the record shows that several offers were received, including one from the protester and one from Toolmate, and under the circumstances we saw no indication that the parties would have bid any differently had the solicitation been issued as an IFB. Under these particular circumstances we saw no reason to upset the procurement. While it is clear that both Toolmate and Milbar disagree with our conclusion, we do not believe that they have presented any new arguments which show that our decision was erroneous as to fact or law. 4 C.F.R. § 21.12(a) (1988).

Finally, Toolmate argues that our decision is inconsistent with ARO Corp., B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165, where we sustained a similar protest concerning the improper use of negotiation. We reached a different conclusion in this case because the record showed here that the agency had

obtained full and open competition pursuant to the RFP while in ARO Corp., B-227055, supra, it was clear from the record that competition was affected by the decision to use negotiation.

The request for reconsideration is denied.

for Seymour Efros

James F. Hinchman
General Counsel